

ORIGINAL

STATE OF MICHIGAN

SUPREME COURT

DIANE K. SHOLBERG, as Personal Representative
for the Estate of **TERRI A. SHOLBERG**,

Docket No.: 146721

Plaintiff/Appellee,

v

COA Docket No.: 307308

Lower Court No.: 11-2711-NI

ROBERT TRUMAN and **MARILYN TRUMAN**,

Defendants/Appellants,

And

DANIEL TRUMAN,

Defendant.

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**PLAINTIFF'S RESPONSE TO DEFENDANTS/APPELLANTS' APPLICATION FOR
LEAVE TO APPEAL**

FILED

MAR 19 2013

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

QUESTION ON APPEAL

- I. Whether The Court Of Appeals Erred In Reversing The Trial Court's Decision Granting Summary Disposition In Favor Of Robert And Marilyn Truman With Respect To The Nuisance Claim When Robert And Marilyn Truman Knew, Or Should Have Known, Of The Continuing Pattern Of Large Animal Elopement Originating From The Property They Own?**

Plaintiff Answers:	No
Defendants Answer:	Yes
Court of Appeals Answer:	No
This Court Should Answer:	No

- II. Whether Plaintiff's Appeal Is Moot As Plaintiff Did Not Receive 100% Of The Damages Sought?**

Plaintiff Answers:	No
Defendants Answer:	Yes
Court of Appeals Answer:	No
This Court Should Answer:	No

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STATEMENT OF PROCEEDINGS AND FACTS

In the trial court and court of appeals, a compact disc was filed with Plaintiff's Revised Response to Defendants' Motion for Summary Disposition. That CD contained all cases, documents, and depositions cited to in Plaintiff's Response. For convenience, a duplicate copy of that CD has been included with this Response.

A. Proceedings

Plaintiff, as personal representative of the Estate of Terri A. Sholberg, brought this action following the death of her daughter, Terri A. Sholberg. Ms. Terri A. Sholberg's died as the result of an accident on July 13, 2010 when her vehicle struck a horse on Stutsmanville Road. Plaintiff brought suit against Defendant Daniel Truman as the owner of the horse and against Defendants Robert and Marilyn Truman as owners of the property and barn from which the horse eloped. Plaintiff alleged negligence, nuisance, and violation of the Equine Activity Liability Act.

A default was entered against Defendant Daniel Truman on December 7, 2010 for failure to appear. Discovery, including depositions and a review of the Emmet County Animal Control records, demonstrated a continuing pattern of large animals eloping from Defendants Robert and Marilyn Truman's property. Defendants Robert and Marilyn Truman (herein after "Defendants") filed a Motion for Summary Disposition, which was heard on September 22, 2011. The Honorable Charles Johnson entered an Order granting Defendants' Motion for Summary Disposition on October 6, 2011.

On October 27, 2011, the Honorable Charles Johnson entered a Default Judgment against Defendant Daniel Truman, but checked the box indicating that it was not a final order. However, on November 4, 2011, the Honorable Charles Johnson amended the Default Judgment to be the final order and close the case. Thereby, the October 6, 2011 Order Granting Summary

Disposition became a final order on November 4, 2011. Plaintiff filed an appeal of right. On November 15, 2012, the Court of Appeals issued a per curiam opinion affirming the Trial Court's grant of summary disposition as to the negligence claim and Equine Activity Liability Act claim. The Court of Appeals reversed and remanded as to the Trial Court's grant of summary disposition as to the nuisance claim. Defendants filed a Motion for Reconsideration that the Court of Appeals denied on January 11, 2013.

B. The Accident and Subsequent Investigation

Ms. Terri A. Sholberg was a 42 year old adult single female employed at Northern Michigan Hospital in the cafeteria. In the early morning hours of July 13, 2010, sometime before 5:11 am, Ms. Terri A. Sholberg was traveling East down Stutsmanville Road on her way to work. Immediately in front of Defendants Robert and Marilyn Truman's property¹ located at 5151 Stutsmanville Road, Ms. Terri A. Sholberg's vehicle struck a horse that was in the middle of the road. Sgt. Timothy Rodwell, a qualified expert in accident reconstruction² and the law enforcement officer that investigated the accident, opined that Ms. Terri A. Sholberg was not at fault for the accident and was not violating any law of the State of Michigan.³ Specifically, Sgt. Rodwell testified that based on his investigation, the accident happened as follows:

A: Yes. I believe that Mr. [Dan] Truman was keeping a horse in a --- in a barn located right directly off this driveway that's --- that's shown in my drawing. And the horse was kept on three sides with a --- with wood. And the gate was a big, strong livestock gate; but it was secured to a wall with baling twine. The baling twine failed to keep that horse in, and it was broken when we looked at it, and the horse was running loose. The horse came into crossing Stutsmanville Road when the --- Miss Sholberg was --- was driving on --- on Stutsmanville Road. An impact occurred between the horse and the vehicle Miss Sholberg was driving, caused Miss Sholberg to lose control, go off the road, flip and rotate. I believe at one point her head was partially ejected from the vehicle, and then it was

¹ See Deed dated December 5, 1989.

² Deposition of Timothy Rodwell ("Rodwell Dep."), pg 6, lines 19-23; pg 7, lines 6-16

³ Rodwell Dep., pg 19, lines 21-24.

crushed, and that why she sustained massive head trauma, and most of her --- the contents of her head came out. And then she came to rest, and we found her at rest with the seat belt on inside her vehicle.⁴

Sgt. Rodwell concluded that the horse actually fell onto the car which may have caused immediately injury to Miss Sholberg.⁵

As part of his investigation, Sgt. Rodwell accumulated the historical records from the Emmet County Sheriff's Department regarding complaints of animal elopement associated with 5151 Stutsmanville Road. Those records were accumulated and attested to by the keeper of the records for Emmet County and included over 30 instances of reported animal elopements from the property owned by Robert and Marilyn Truman since 2003. These reports primarily include horses and cows.⁶ Kimberly Ostwald, the keeper of the records for the Emmet County Sheriff's Department, was subpoenaed to produce the records of animal elopement involving 5151 Stutsmanville Road. Ms. Ostwald testified that there were additional records that Emmet County maintained prior to 2003, but it was 2003 when the county computerized its records keeping. All the records were produced at her deposition.⁷ Under MCR 2.116(C)(10) these records should be considered and would be admissible evidence pursuant to MRE 803(8). In addition, depositions were taken of the eye witnesses or reporting persons who could document the animal elopement.

According to the records provided by the Emmet County Sheriff's Department, reports of animals eloping from 5151 Stutsmanville Road include but, are not limited to the following:

- On April 22, 2003, Jan Martindale reported that several cows escaped and entered the road on Stutsmanville Road, creating a road hazard.⁸

⁴ Rodwell Dep., pg 18, line 15-pg 19, line 8

⁵ Rodwell Dep., pg 19, lines 9-18

⁶ Despite the fact that most reports deal with horses and cows, there is evidence that other types of animals, such as chickens were frequently eloping from the property as well, however individuals did not consider this to be as dangerous as loose cows or horses. See Deposition of Alfred Major ("Alfred Major Dep."), pg 12, lines 5-14; and Deposition of Becky Major ("Becky Major Dep."), pg 8, lines 4-6.

⁷ Deposition of Kimberly Ostwald pg 8, line 22-pg 9, line 3

⁸ See EMCD Event Report dated April 22, 2003.

- On May 20, 2003, an unidentified female caller reported that cows escaped from their pen, and she was afraid someone would hit them.⁹
- On June 22, 2003, Dan Truman called to report that one of his boars had escaped.¹⁰
- On June 29, 2003, Lorie Seltenright reported that two pigs escaped and were in roadway on Stutsmanville Road creating a road hazard. She stated that she believe their owner to be the resident of the “crashed up” house nearby.¹¹
- On July 12, 2003, Mike Ruggles reported that five horses escaped and were in roadway on Stutsmanville Road creating a road hazard.¹²
- On October 08, 2003, Cindy Shepard reported that cows had escaped and entered in roadway on Stutsmanville Road creating a road hazard.¹³
- On April 22, 2004, Becky Major reported that a cow was loose and on the side of Stutsmanville Road.¹⁴
- On July 13, 2004, Bill Harrison reported that three horses escaped and were on State Road creating a road hazard.¹⁵
- On July 25, 2004, Jan Morley reported that a horse escaped from its pen.¹⁶
- On July 25, 2004, Jessilynn Krebs reported that ten cows escaped and were in the roadway creating a road hazard.¹⁷
- On March 12, 2005, a passerby named Al Majors reported that a herd of cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.¹⁸
- On May 09, 2005, Stacy Norton reported that 12 cows escaped and were headed down Walker towards State Road.¹⁹
- On June 2, 2005, a passerby named Steve Perry reported that three cows had escaped and were in the roadway creating a road hazard on Stutsmanville Road.²⁰
- On June 29, 2005, Kimberly Boynton called and reported that three cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.²¹
- On November 10, 2005, a passerby named Pat Schwartz reported that several cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.²²
- On January 24, 2006, Richard Cobb reported that six cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.²³

⁹ See EMCD Event Report dated May 20, 2003
¹⁰ See EMCD Event Report dated June 22, 2003
¹¹ See EMCD Event Report dated June 29, 2003
¹² See EMCD Event Report dated July 12, 2003
¹³ See EMCD Event Report dated October 8, 2003
¹⁴ See EMCD Event Report dated April 22, 2004
¹⁵ See EMCD Event Report dated July 13, 2004
¹⁶ See EMCD Event Report dated July 25, 2004
¹⁷ See EMCD Event Report dated July 25, 2004
¹⁸ See EMCD Event Report dated March 12, 2005
¹⁹ See EMCD Event Report dated May 9, 2005
²⁰ See EMCD Event Report dated June 2, 2005
²¹ See EMCD Event Report dated June 29, 2005
²² See EMCD Event Report dated November 10, 2005

- On April 18, 2006, an anonymous caller reported that horses escaped and were in the middle of Stutsmanville Road “down by the Trumans.”²⁴
- On May 09, 2006, an anonymous male caller reported that twenty cows escaped and were in the roadway creating a road hazard on Stutsmanville Road. The anonymous caller stated that he knew “Truman” was the last name of the owner of the cows.²⁵
- On August 09, 2006, Edward Jelinek reported that five cows escaped and were in and out of the roadway creating a road hazard.²⁶
- On December 08, 2006, Ann Jewell reported that several pigs escaped and were in the roadway creating a road hazard.²⁷
- On February 26, 2007, an anonymous male caller reported that a pig escaped and was in the roadway on Stutsmanville Road.²⁸
- On March 3, 2007, a caller reported that a black cow was loose and in the roadway.²⁹
- On June 25, 2007, Al Majors reported that two calves and a escaped and were in the roadway creating a road hazard on Stutsmanville Road.³⁰
- On June 26, 2007, Becky Majors reported that a calf escaped and was in the roadway creating a road hazard on Stutsmanville Road.³¹
- On July 7, 2007, Dan Truman called to let the police know that he was moving cows and one got away.³²
- On July 8, 2007, an anonymous female caller reported that hogs escaped and were in the roadway on creating a road hazard Stutsmanville Road.³³
- On October 4, 2007, a anonymous caller reported that two cows escaped and were walking down the middle of Stutsmanville Road.³⁴
- On October 05, 2007, Mary Rigsby reported that three cows escaped and were the in roadway creating a road hazard on Stutsmanville Road.³⁵
- On May 27, 2008, Jay Steffle reported that 15 Cattle were loose on State Road.³⁶
- On August 25, 2008, Louie Fisher reported that two cows escaped and were creating a road hazard.³⁷

²³ See EMCD Event Report dated January 24, 2006
²⁴ See EMCD Event Report dated April 18, 2006
²⁵ See EMCD Event Report dated May 9, 2006
²⁶ See EMCD Event Report dated August 9, 2006
²⁷ See EMCD Event Report dated December 8, 2006
²⁸ See EMCD Event Report dated February 26, 2007
²⁹ See EMCD Event Report dated March 3, 2007
³⁰ See EMCD Event Report dated June 25, 2007
³¹ See EMCD Event Report dated June 26, 2007
³² See EMCD Event Report dated July 7, 2007
³³ See EMCD Event Report dated July 8, 2007
³⁴ See EMCD Event Report dated October 4, 2007
³⁵ See EMCD Event Report dated October 5, 2007
³⁶ See EMCD Event Report dated May 27, 2008
³⁷ See EMCD Event Report dated August 25, 2008

- On April 3, 2010, Al Major reported that 8-10 cows escaped and were in the middle of Stutsmanville Road creating a road hazard.³⁸
- On May 06, 2010, Janice Hartman reported that 10 cows were loose.³⁹
- On May 07, 2010, James Major reported that a herd of cattle were out by the road at the Truman property.⁴⁰
- On May 29, 2010, Becky Major reported that 12 or more cows escaped and were in the roadway on Stutsmanville Rd creating a road hazard.⁴¹
- On July 13, 2010, at 5:11 a.m. William Brecheisen reported a car accident that left a car upside down in a field with the driver deceased, and a deceased horse in the roadway.⁴²

Additionally, depositions were taken of many of the witnesses of animal elopement, neighbors, and community members. These individuals confirmed numerous animal elopements from 5151 Stutsmanville Road.

- William Brecheisen testified that the animals eloping from 5151 Stutsmanville Road was a “***continual thing*** ever since [he] moved in”⁴³ and that “it’s been a constant thing, those animals always getting out.”⁴⁴
- William Brecheisen testified that the animals eloping from 5151 Stutsmanville Road “was almost like monthly.”⁴⁵
- Anne Brecheisen testified that the animals eloping from 5151 Stutsmanville Road was a “***habitual problem***,”⁴⁶ which happened on a “regular basis,”⁴⁷ and that animals “were continually getting out on the road.”⁴⁸
- Anne Brecheisen testified that the animals eloped from 5151 Stutsmanville Road on “several occasions, once a week, twice a week,”⁴⁹ and that it was “about a 100 times a year.”⁵⁰
- Alfred Major testified that it was “common knowledge in the community” and that “[e]verybody knew” that animals get loose from 5151 Stutsmanville Road.⁵¹

³⁸ See EMCD Event Report dated April 3, 2010

³⁹ See EMCD Event Report dated May 6, 2010

⁴⁰ See EMCD Event Report dated May 7, 2010

⁴¹ See EMCD Event Report dated May 29, 2010

⁴² Deposition of William Brecheisen (“William Brecheisen Dep.”), pg 8, lines 10-16

⁴³ Deposition of William Brecheisen (“William Brecheisen Dep.”), pg 11, lines 24-25, emphasis added

⁴⁴ William Brecheisen Dep., pg 12, lines 12-17

⁴⁵ William Brecheisen Dep., pg 12, line 7

⁴⁶ Deposition of Ann Brecheisen (“Ann Brecheisen Dep.”), pg 10, line 15, emphasis added

⁴⁷ Anne Brecheisen Dep., pg 14, lines 19-20

⁴⁸ Anne Brecheisen Dep., pg 14, lines 15-18

⁴⁹ Anne Brecheisen Dep., pg 9, lines 10-13

⁵⁰ Anne Brecheisen Dep., pg 10, lines 4-5

- Alfred Major testified that he struck a cow that had eloped from the 5151 Stutsmanville Road property.⁵²
- Janice Hartman testified that she has experienced animals eloping from 5151 Stutsmanville Road “numerous times. Meaning at least a dozen.”⁵³
- Becky Major testified that she is familiar with the fact that “animals get out a lot” from 5151 Stutsmanville Road.⁵⁴
- Becky Major testified that she called 9-1-1 “twice within three weeks of the accident” regarding loose animals.⁵⁵
- Becky Major testified that “[l]ast year [she] called [9-1-1] probably four or five times. In previous times to that, maybe a total of eight or nine times.”⁵⁶
- Becky Major testified that the 5151 Stutsmanville Road Property has a reputation in the community including that “it doesn’t seem to be well kept. The animals are constantly loose...”⁵⁷
- Becky Major testified that “The community, family members and neighbors, we’ve discussed the fact that, you know, nobody really likes to drive past there because they don’t know what’s going to come out.”⁵⁸
- Becky Major testified that her father, Alfred Major, hit and killed one of Daniel Truman’s cows and that Daniel Truman’s son took the unborn calf to school for science class.⁵⁹

C. Ownership of 5151 Stutsmanville Road

There is no dispute that the property in question, 5151 Stutsmanville Road, is owned by Robert and Marilyn Truman. In their Answer to the First Amended Complaint, Robert and Marilyn admitted that they are the legal title holders to the property.⁶⁰

⁵¹ Alfred Major Dep., pg 14, lines 6-11

⁵² Alfred Major Dep., pg 8, lines 6-8 and pg 13, lines 1-2

⁵³ Deposition of Janice Hartman (“Hartman Dep.”), pg 13, lines 20-21

⁵⁴ Becky Major Dep., pg 8, lines 1-3

⁵⁵ Becky Major Dep., pg 8, lines 12-16

⁵⁶ Becky Major Dep., pg 10, lines 15-18

⁵⁷ Becky Major Dep., pg 22, lines 23-25

⁵⁸ Becky Major Dep., pg 23, lines 8-11

⁵⁹ Becky Major Dep., pg 26, lines 6-17

⁶⁰ See Paragraphs 5 and 13 of Defendants’ Answer to First Amended Complaint. See also Deed dated December 5, 1989.

In March of 2010, some four months prior to the accident, Robert and Marilyn Truman executed a mortgage to 5151 Stutsmanville Road and agreed that they had the following rights with regard to the property in question here:

POSSESSION AND MAINTENANCE OF THE PROPERTY.

Grantor and Lender agree that Grantor's possession and use of the Property shall be governed by the following provisions:

Possession and Use. Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property, and (3) collect the Rents from the Property.

Duty to Maintain. Grantor shall maintain the property in good condition and promptly perform all repairs, replacement, and maintenance necessary to preserve its value.

Nuisance, Waste. Grantor shall not cause, conduct, or permit any nuisance . . . on . . . the Property or any portion of the Property.

Duty to Protect. Grantor agrees neither to abandon or leave unattended the Property.⁶¹

Also, in executing the Mortgage, Robert and Marilyn Truman represented to the Bank that they held "good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage, and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender."⁶² Further, Robert and Marilyn have maintained insurance on the property.⁶³

⁶¹ See Mortgage, page 2-3 (emphasis added).

⁶² See Mortgage, pg 5.

⁶³ See Schedule of Insured Locations.

D. Defective Condition/Equipment on the Property

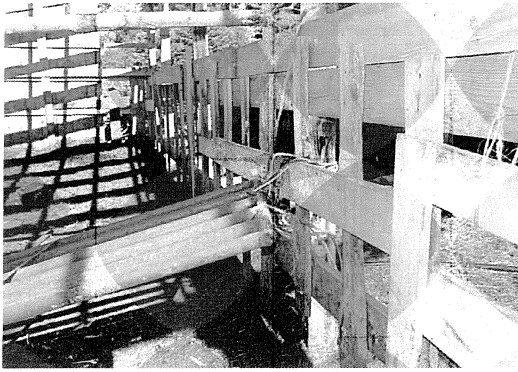


Figure 1

As owners of the property at 5151 Stutsmanville Road, Defendants provided the home, barn, lean-to, and equipment on the property. These buildings and equipment were investigated by Deputy Poumade immediately following the auto accident on July 13, 2010. Deputy Poumade was dispatched to the

scene and tasked with interviewing Dan Truman and taking photos of where the horse was kept.

There is no dispute that the horse was boarded on the property owned by Robert and Marilyn



Figure 2

Truman. Deputy Poumade testified that he took photos of the gate that was used to enclose the horse into the lean-to.⁶⁴ It is apparent from the photos that the metal gate was not physically attached to the lean-to. Also according to Deputy Poumade, Dan Truman advised

him that he used a rope and chain on one end to tether the metal gate to one side of the lean-to (Figure 1) and baler's twine⁶⁵ on the other end of the metal gate (Figure 2).

As the pictures show, the gate was only attached with baler's twine. Additionally, Dan Truman never contradicted this while discussing the gate with Deputy Poumade.

Q: So, while you were actually looking at the gate and the way it was, well, I guess secured, were you talking to Mr. Truman?

A: I believe so, yes.⁶⁶

⁶⁴ Poumade Dep, pg 10 lines 11-15

⁶⁵ Deputy Poumade referred to it as "baler's twine" in his report and as "binder twine" at points in his deposition. Throughout the depositions "baler's twine" and "binder twine" have been used interchangeably and refer to the same material which was used to secure the gate seen in Figures 1 and 2.

⁶⁶ Deposition of Robert J. Poumade ("Poumade Dep."), pg 14, lines 11-14

Q: And, when you and Mr. Truman walked in, he was going to show you how he stabled the horse, did he make any comments or any statements that something was different about the gate and the manner in which it had been secured?

A: He didn't describe any discrepancies in the way the gate had been closed, I guess.

Q: Obviously it appears that the gate has sort of fallen over, right?

A: Yes.

Q: And he didn't say, well, I used, you know, any kind of chain or any kind of -- anything on this end that's not here anymore or this was on a hinge or anything like that?

A: Correct, he didn't make any statements that anything was missing.

Q: And he didn't indicate that anybody had been in there to sort of doctor or change the manner in which the gate had been secured?

A: No, no, he didn't.⁶⁷

Baler's twine is not the proper way to secure a 2,000 pound horse. As the Emmet County Animal Control Officer for over 28 years and holder of a number of certificates and educational classes regarding animal control issues, Jack Balchik testified that, in this case, baler's twine would not be sufficient to hold in a large animal like the horse in this case.⁶⁸ He testified that a 2000 pound horse is a "pretty strong animal"⁶⁹ and that "one strand...or two strands would not be enough" to keep a horse in its stall.⁷⁰

Likewise, Deputy Rodwell testified that the gate was not properly installed⁷¹ and that he was "shocked"⁷² that the gate was secured with baler's twine. He testified that even based on

⁶⁷ Poumade Dep., pg 15, line 24 – pg 16, line 18

⁶⁸ Deposition of Jack J. Balchik ("Balchik Dep."), pg 61, lines 2-8

⁶⁹ Balchik Dep., pg 68, line 24-pg 69, line 10

⁷⁰ Balchik Dep., pg 60-61.

⁷¹ Rodwell Dep., pg 26 line 21-pg 27, line 23

⁷² Rodwell Dep., pg 24, line 24-pg 25, line 23

“common sense,” baler’s twine would never be sufficient to secure a horse, especially a horse as big as the one in this case.⁷³

E. Robert and Marilyn Truman’s Knowledge of the Defective Condition

There is also evidence that Defendants Robert and Marilyn Truman knew, or should have known about the conditions of the property and the defective equipment and the continuing pattern of large animal elopement which resulted. Marilyn Truman testified that prior to the accident in July 2010, she was aware of the animal elopement from 5151 Stutsmanville Road. Specifically the following question was posed:

Q: Did you have knowledge or information about – I’m going to use the word elopement. Do you know what that – do you know how I use that word?

A: Yes.

Q: Animals leaving the property?

A: Yes.

Q: Prior to the accident, were you aware of complaints being made about 5151 Stutsmanville Road?

A: Yes.

Q: And how did you become aware of that?

A: Get telephone calls wondering where Dan is because his animals were out. That’s the only thing I know. I haven’t never --- I haven’t seen them.⁷⁴

Marilyn Truman testified that she sometimes received these calls at T and C, which was her husband’s business in Petoskey, and that she probably told her husband when she got the calls.

Q: Did you tell your husband that you got these phone calls?

A: Probably did if he was around.⁷⁵

⁷³ Rodwell Dep., pg 24, line 24-pg 25, line 23

⁷⁴ Marilyn Truman Dep., pg 24, line 19 – pg 23, line 7

⁷⁵ Marilyn Truman Dep, pg 24, lines 5-7.

Furthermore, when questioned about what, if anything, Marilyn or Robert did to stop or correct the problem it is clear from their testimony that neither took any affirmative steps to correct the problem.⁷⁶ Robert Truman testified that he was aware that Dan Truman had animals on the property at 5151 Stutsmanville Road including horses and cows,⁷⁷ but provided no testimony regarding any measures to abate the nuisance of constantly eloping animals. In other words, Defendants knew of the activities that were taking place on their property, knew of the constant problem of elopement, and failed to take any measures to correct it.

⁷⁶ Marilyn Truman Dep., pg 25; Robert Truman Dep., pg 52.

⁷⁷ Robert Truman Dep., pg 44.

LAW AND ARGUMENT

STANDARD OF REVIEW

The decision to grant or deny summary disposition is a question of law that is reviewed de novo.⁷⁸

I.

THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT’S DECISION GRANTING SUMMARY DISPOSITION IN FAVOR OF ROBERT AND MARILYN TRUMAN WITH RESPECT TO THE NUISANCE CLAIM WHEN ROBERT AND MARILYN TRUMAN KNEW, OR SHOULD HAVE KNOWN, OF THE CONTINUING PATTERN OF LARGE ANIMAL ELOPEMENT ORIGINATING FROM THE PROPERTY THEY OWN

At common law, a “nuisance arises from the existence of a dangerous condition”⁷⁹ and an “unreasonable interference with a common right enjoyed by the general public.”⁸⁰

The term "unreasonable interference" includes conduct that (1) significantly *interferes with the public's health, safety*, peace, comfort, or convenience, (2) is *proscribed by law*, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.⁸¹

Furthermore, the City of Harbor Springs has codified the definition and prohibition of nuisances. The Harbor Springs City Code defines a nuisance as:

Whatever annoys, injures, or endangers the safety, health, comfort or repose of the public; offends public decency; interferes with, obstructs or renders dangerous any street, highway or navigable stream; or in any way renders the public insecure in life or property, is hereby declared to be a public nuisance.⁸²

⁷⁸ *Van v Zahorik*, 460 Mich 320, 326, 597 NW2d 15, 18 (1999).

⁷⁹ *Martin v State*, 129 Mich App 100, 107, 341 NW2d 239, 243 (1983).

⁸⁰ *Cloverleaf Car Co v Wykstra Oil Co*, 213 Mich App 186, 190, 540 NW2d 297 (1995)

⁸¹ *Id.*

⁸² Harbor Springs City Code 60.100

The City Code goes on to prohibit nuisances. Specifically section 60.101 of the Harbor Springs City Code provides in relevant part:

Nuisances, in General, Prohibited. No person shall commit, create or maintain any nuisance, or permit any nuisance to be committed, created or maintained on any property owned, occupied or possessed by him. . . .⁸³

The Harbor Springs city Code does not require possession of the land. The Code uses the conjunction “or.” An owner, an occupier, or a possessor can be liable for nuisance.

Like the Harbor Springs City, which holds landowners liable for any nuisance taking place on their property, at common law nuisance liability can also be attached to a defendant who “owned” the land, which is contrary to the trial court’s ruling and consistent with the court of appeals in this case. Therefore, claims for nuisance allows for broader liability than claims for premises liability, which is conditioned on possession and control of the land.⁸⁴ Specifically, in *Cloverleaf Car Co v Wykstra Oil Co*,⁸⁵ the Michigan court of appeals explained that:

[a] defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.⁸⁶

Again, the conjunction “or” is used between “owned” and “controlled.” Allowing owners or possessors to be held liable creates an intentionally broader scope of liability. The reason for this broader scope of liability is that landowners should be held liable if they allow continuing patterns of activity on their property that constitutes a nuisance. The Court explained

We perceive a valid distinction between limiting a landowner’s duty to protect his invitees from third-party crime and imposing

⁸³ Harbor Springs City Code 60.101 (emphasis added)

⁸⁴ *Radloff v State*, 116 Mich App 745, 754, 323 NW2d 541 (1982)

⁸⁵ *Cloverleaf Car Co*, 213 Mich App at 191.

⁸⁶ *Id.* (emphasis added); see also *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 252; 508 NW2d 142 (1993).

liability on a *landowner for* creating or *allowing continuing patterns* of . . . activity on his premises⁸⁷

Therefore, when a landowner knows, or has reason to know, of a continued pattern of behavior on property they own, the landowner may be held liable if he fails to exercise reasonable care to prevent the nuisance.⁸⁸

Besides being liable as the owners of the property, Defendants Robert and Marilyn Truman knew, pursuant to the testimony of Marilyn Truman, and had reason to know of the nuisance, and yet to absolutely took no steps to abate the nuisance on their property. Defendant Marilyn Truman admitted to receiving calls about animal elopement from the property. She admitted to telling her husband about the calls. As owners of the property, they had a reason to inquire about the animal elopement and take actions. They could not sit idly by while having knowledge of a dangerous condition on property that they own. The neighbors in this case described the elopement of animals from the property as “continual,” “habitual” and “weekly.”

Defendants, as owners of the land at 5151 Stutsmanville Road are liable for nuisances arising on their land. Further, after hearing of the nuisance, they did nothing. They did not investigate. They took no corrective action. The only thing they did was mortgage the property to secure a loan for their benefit.

Defendants’ argue that “some sort of affirmative ‘conduct’” is required for a nuisance claim and that a landowner is not liable for a nuisance originating from his or her land. However, neither contentions is in agreement Michigan and neither contention should be adopted by this Court.

⁸⁷ *Wagner v Regency Inn Corp*, 186 Mich App 158, 162-163, 463 NW2d 450 (1990) (emphasis added)
⁸⁸ *Id.* at 163-164.

A. A Nuisance Claim Does Not Require “Affirmative Conduct”

Contrary to Defendants’ assertion that a public nuisance always requires affirmative conduct, Michigan law recognizes that a nuisance can arise from an act, omission, pattern of conduct, or even the presence of a pier.

In *Dinger v Department of Natural Resources*,⁸⁹ a case cite by Defendants, the court looked to *Bronson v Oscoda Township*’s⁹⁰ analysis of a public nuisance. The *Bronson* court explained

No better definition of a public nuisance has been suggested than that of an act or omission “which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty’s subjects.” The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public.

Public nuisance includes interference with the public health, the public safety, the public morals, the public peace, the public comfort, and the public convenience in travel.⁹¹

Ultimately, the court had to analyzing whether a pier, which caused sand bar in Lake Huron, constituted a public nuisance. Rather than dismissing the action because a pier is not conduct, the court recognized that such items could interfere with the public’s use of the lake. Instead, the court held that the pier was not a public nuisance because it did not “constitutes an unreasonable or significant interference with the public’s right to use Lake Huron”⁹² because the Lake Huron was vast and only a small portion was effected by the pier and sand bar.⁹³

⁸⁹ *Dinger v Dep’t of Natural Res.*, 191 Mich App 630, 636, 479 NW2d 353, 356 (1991)

⁹⁰ *Bronson v Oscoda Twp*, 188 Mich App 679, 470 NW2d 688 (1991)

⁹¹ *Id.* at 684 (emphasis added)

⁹² *Id.* at 686

⁹³ *Id.* at 685

B. Case Law Clearly States That An Owner Can Be Liable For Allowing Continued Patterns Of Activity On His Or Her Land

Defendant goes to great lengths to try and explain that *Cloverleaf Car Co v Wykstra Oil Co.* means something other than the clear language of “defendant owned or controlled the land from which the nuisance arose.”⁹⁴ The language is clear. Even the court in *Wagner*, a case heavily relied upon by Defendants, saw a “valid distinction” between holding a landowner liable for a continued pattern of conduct on the land he or she owns compared to a random act of violence on his or her land.

This is not a case seeking to impose strict liability as proffered by Defendants. Rather this case is seeking to hold a landowner, who actively benefits from said ownership, to be liable for allowing a continued pattern of activity for decades. Although Defendants argue that investors will stop buying property, current Michigan law still protects them. A landowner would only become liable for allowing a continued pattern of activity for decades, similar to this case. To adopt Defendants argument would be to encourage individuals to buy houses in Michigan, rent them out, move to another state and simply ignore the property.

II.

PLAINTIFF’S APPEAL IS NOT MOOT AS PLAINTIFF DID NOT RECEIVE 100% OF THE DAMAGES SOUGHT

Contrary to Defendants’ assertion, Plaintiff did not obtain 100% of the damages sought. Plaintiff does not dispute that Michigan has abolished joint and several liability. However, Plaintiff vigorously disputes that she has been fully compensated and that 100% of the fault has been allocated to Defendant Daniel Truman. Plaintiff’s position is that the trial court erred in dismissing her claims against Defendants because some fault should be attributed to Robert and Marilyn Truman.

⁹⁴ *Cloverleaf Car Co*, 213 Mich App at 191

Defendants repeatedly classify Plaintiff as receiving a judgment for the “full amount of damages sustained” but fail to provide any support for this assertion. In support of this argument, Defendants rely upon *Stanke v Stanke*⁹⁵ and *K-Mart Corp v Logan*,⁹⁶ both of which are unpublished and factually distinguishable from the instant case. In *Stanke*, the plaintiff requested that the court “enter judgment . . . for the full amount alleged in its complaint.”⁹⁷ Because the trial court did so, namely awarded the full amount alleged in the complaint, “there remained no more fault to be apportioned to the defendant.”⁹⁸

Likewise, in *K-Mart Corp v Logan*,⁹⁹ there was a set amount of damages at issue because Michael Garzoni had embezzled money. K-Mart obtained a judgment against Garzoni for the full amount of damages, namely the amount of money embezzled.¹⁰⁰ Therefore, the Court barred K-Mart from later seeking a judgment against alleged co-conspirators stating

Because plaintiff has already received a judgment against Michael Garzoni assessing all liability to him for plaintiff's damages, there is no liability to be apportioned among defendants¹⁰¹

In other words, in both *Stanke* and *K-Mart Corp*, the plaintiffs received judgments in the full amount of their damage, either the amount asked for in the complaint or the amount of money embezzled. However, in this case, the loss to Plaintiff was a priceless life, and Plaintiff's Complaint did not contain a specific dollar amount. Furthermore, at the hearing on the entry of default, Plaintiff requested “five to ten million” dollars in damages.¹⁰² Then, without attributing

⁹⁵ *Stanke v Stanke*, unpublished decision per curium opinion of the Court of Appeals, decided January 24, 2008 (Docket No. 263446).

⁹⁶ *K-Mart v Logan*, unpublished per curium of the Court of Appeals, decided July 10, 1993 (Docket No. 232393).

⁹⁷ *Stanke v Stanke*, unpublished decision per curium opinion of the Court of Appeals, decided January 24, 2008 (Docket No. 263446).

⁹⁸ *Id.*

⁹⁹ *K-Mart v Logan*, unpublished per curium of the Court of Appeals, decided July 10, 1993 (Docket No. 232393).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² October 27, 2011 Hearing Transcript, page 14, lines 18-19.

any percentage of fault, the trial court awarded the lower end of Plaintiff's request. The trial court never made any findings of the amount of fault attributable to Dan Truman. Perhaps the trial court thought Plaintiff suffered \$10,000,000.00 in damages and found Daniel Truman to be 50% at fault thereby awarding \$5,000,000.00 to Plaintiff. However, the record does not provide any allocation of fault.

In fact, the trial court provided that there "is no precise mathematical methodology that the Court or a jury for that matter, can impose in valuing something like the loss of society and companionship."¹⁰³ Likewise, the trial court recognized that "there's probably no amount of money that the Plaintiff would rather have than the love and affection of her daughter that she can't have"¹⁰⁴ Therefore, based on this record, it is incredible for Defendants to argue that Plaintiff was fully compensated and received everything that she asked for.

Granted, it would seem that by dismissing Plaintiff's claims against Robert and Marilyn Truman, the trial court was effectively finding that they were not at fault. However, that is the point of Plaintiff's appeal. Plaintiff's position is that Robert and Marilyn Truman are, at least in part, at fault for the death of Terri Sholberg. To accept Defendants' argument that because Plaintiff got a judgment and because the trial court dismissed Defendants, Plaintiff has been fully compensated, is to deprive Plaintiff of the right to have this Court review the trial court's decision to dismiss Defendants. In fact, accepting Defendants' position would eliminate a plaintiff's right to have this Court review a trial court's dismissal of a defendant, when judgment is entered against the remaining defendants, regardless of whether the trial court erred in dismissing the defendant.

¹⁰³ October 27, 2011 Hearing Transcript, page 22, lines 20-22.

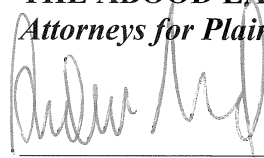
¹⁰⁴ October 27, 2011 Hearing Transcript, page 22, lines 23-25.

RELIEF REQUESTED

Plaintiff respectfully requests that this Court deny Defendants/Appellants' Application for Leave to Appeal.

Respectfully submitted,

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Dated: March 19, 2013

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